Supreme Court, U. S.
FILED
APR 13 1998
CLERK

No. 97-1417

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

ALTAI, INC.,

Petitioner,

v.

COMPUTER ASSOCIATES INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER AND SUPPLEMENT TO THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Of Counsel:

CHARLES ALAN WRIGHT
727 East Dean Keeton Street
Austin, Texas 78705
(512) 471-7188

MARC M. ARKIN
140 West 62nd Street
New York, New York 10023
(212) 636-6850

DAVID G. POST
1719 North Broad Street
Philadelphia, Pennsylvania 19122
(215) 204-4539

SUSAN G. BRADEN
Counsel of Record
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075
Counsel for Petitioner

LARRY S. FREEDMAN
Platinum *technology, inc.*
1815 South Meyers Road
Oakbrook Terrace, Illinois 60181
(630) 691-0404

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

34 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. Altai Satisfied The "Laxer" Circuits' Standard For Obtaining A Foreign Antisuit Injunction 2

B. Altai Also Satisfied The *China Trade* Threshold For Obtaining A Foreign Antisuit Injunction 2

1. The Final Judgment In *Altai I* And CA's Action In France Involve The "Same Parties" 3

2. The Final Judgment In *Altai I* Is "Dispositive" Of CA's Action In France 4

3. CA's Claims Under French Copyright Law Were Merged Into The Final Judgment In *Altai I* 5

C. The Berne-Implementation Act Does Not Affect The Authority Of A United States Federal Court To Enter A Foreign Antisuit Injunction 6

D. The Court's Review Of The Question Presented Will Provide A Uniform And Much-Needed Standard For Obtaining A Foreign Antisuit Injunction 7

E. The Court Should Grant The Writ Of Certiorari 8

TABLE OF AUTHORITIES

CASES: **Page**

Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425 (7th Cir. 1993) 2, 7

Alpert's Newspaper Delivery, Inc. v. New York Times, 876 F.2d 266 (2d Cir. 1989) 3

Burgos v. Hopkins, 14 F.3d 787 (2d Cir. 1994) 5

Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343 (2d Cir. 1995) 3

China Trade & Dev. Corp. v. M.V. Choong Young, 837 F.2d 33 (2d Cir. 1987) ..... *passim*

Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544 (E.D.N.Y. 1991) ..... *passim*

Computer Assocs. Int'l, Inc. v. Altai, Inc., 126 F.3d 365 (2d Cir. 1997) ..... *passim*

Davidson v. Capuano, 792 F.2d 275 (2d. Cir. 1996) 5

First City Federal Savings Bank v. Dennis, 128 F.R.D. 180 (S.D.N.Y 1989) 4

Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349 (6th Cir. 1992) 5

Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir.), *cert denied*, 117 S. Ct. 77 (1996) 2, 7

Martin v. Wilks, 490 U.S. 755 (1989) 3

Medtronic, Inc. v. Catalyst Research Corp., 518 F. Supp. 946 (D. Minn.), *aff'd* 664 F.2d 660 (8th Cir. 1981) 5

Nevada v. United States, 463 U.S. 110 (1983) 5

In Re Ronco, 838 F.2d 212 (7th Cir. 1988) 4

Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852 (9th Cir. 1981) *cert. denied sub nom. Northwest Sports Enterprises, Ltd. v. Seattle Totems Hockey Club, Inc.*, 457 U.S. 1105 (1982) 2

Stein Assocs., Inc. v Heat & Control, Inc., 748 F.2d 653 (Fed. Cir. 1984) 5

In Re Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F. 2d 907 (5th Cir. 1971), *vacated on other grounds sub nom. M/S Bremer v. Zapata Off-Shore* Co., 407 U.S. 1 (1972) 2

STATUTORY PROVISIONS AND RULES:

Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) ..... *passim*

17 U.S.C. § 104(c) (1994) 6

Fed. R. Civ. P. 15(b) 6

OTHER AUTHORITIES:

4 Melville B. Nimmer & David B. Nimmer, *Nimmer On Copyright* (1997 ed.) 5

Restatement (Second) of Judgments (1982) 5

No. 97-1417

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

ALTAI, INC.,

Petitioner,

v.

COMPUTER ASSOCIATES INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

---

REPLY BRIEF FOR THE PETITIONER

In its brief in opposition to the petition for certiorari, respondent Computer Associates International, Inc. ("CA") does not contest that there is a well-established division among the United States Courts of Appeals regarding the standard for granting a foreign antisuit injunction and the weight that international comity should be accorded in that standard. Instead, CA asserts that this case does not present the Court with an appropriate opportunity to resolve that division because petitioner Altai, Inc. ("Altai") does not meet threshold requirements of the Court of Appeals for the Second Circuit for applying its standard. (Br. in Op. at 6-7.)

There should be no mistake that Altai is directly affected by this division and likely would have prevailed in obtaining the foreign antisuit injunction requested against CA, in at least the United States Courts of Appeals for the Fifth, Seventh, Eighth,

and Ninth Circuits, as discussed in the petition. (Pet. at 16-21a.) In addition, Altai will establish in this reply, as it did below, that the "same parties" and "dispositive" action threshold of *China Trade and Dev. Corp. v. M.V. Choong Young*, 837 F.2d 33, 35 (2d Cir. 1987), was met.

A. Altai Satisfied The "Laxer" Circuits' Standard For Obtaining A Foreign Antisuit Injunction.

CA's assertion that the division among the circuits is not implicated in this case is both incorrect and misleading. (Br. in Op. at 5.) Allowing CA to continue to maintain its French action could result in "separate adjudications . . . [with] inconsistent rulings."[1] Altai also established that by November 16, 1994, when Altai filed a motion for a foreign antisuit injunction, CA's French action was "inequitable,"[2] "harm[ful],"[3] and "vexatious,"[4] which the Court of Appeals for the Second Circuit did not seriously dispute. Therefore, a foreign antisuit injunction likely would have been granted in any of those circuits applying a "laxer" standard for obtaining a foreign antisuit injunction, even if the final judgment in *Altai I* did not have preclusive effect on CA's French copyright claims, which it does. (Pet. at 18-19.)

B. Altai Also Satisfied The *China Trade* Threshold For Obtaining A Foreign Antitrust Injunction.

For many years, the Court of Appeals for the Second Circuit followed *China Trade's* requirement that the party

---

[1] *See Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied sub nom. Northwest Sports Enterprises, Ltd. v. Seattle Totems Hockey Club, Inc.*, 457 U.S. 1105.

[2] *See In Re Unterweser Reederei, GmbH*, 428 F.2d 888, 896 (5th Cir. 1970), *aff'd on reh'g en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated on other grounds sub nom. M/S Bremen v. Zapata Off-Shore* Co., 407 U.S. 1 (1972).

[3] *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-33 (7th Cir. 1993).

[4] *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir.), *cert. denied*, 117 S. Ct. 77 (1996).

seeking an antisuit injunction demonstrate that the parties in the United States and foreign action were the same and that resolution of the case before the United States court would be dispositive of the foreign action. Altai also satisfied this threshold.[5]

1. The Final Judgment In *Altai I* and CA's Action In France Involve The "Same Parties."

Even assuming that the district court did not have jurisdiction over Altai's French distributor FASTER, the "same parties" element of *China Trade* was satisfied. (Pet. App. at 9-14a.) As argued below,[6] FASTER was in privity with Altai, an issue which the Second Circuit failed to reach, despite the fact that Altai and FASTER's interests were "virtually identical." *See, e.g. Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995); *Alpert's Newspaper Delivery, Inc. v. New York Times*, 876 F. 2d 266, 270 (2d Cir. 1989) (finding privity where the nonparty's interest are "adequately represented").

In addition, CA's brief in opposition mentions, almost as an aside, that L'Agence is not a party to CA's pending appeal in France. (Br. in Op. at 3.) CA filed an appeal of the Commercial Court's decision determining that Altai did not violate French copyright law with the Cour d' Appel in Paris on April 25, 1995 — well before the district court's June 17, 1996 decision was issued, denying Altai's motion for a

---

[5] The three other circuits that apply a similar threshold analysis for issuing a foreign antisuit injunction, however, have applied it only in cases where a final judgment of a United States federal court had not yet issued. *See, e.g., Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992); *Stein Assocs., Inc. v. Heat & Control, Inc.* 748 F.2d 653, 658 (Fed. Cir. 1984); *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955 (D.Minn.), *aff'd* 664 F.2d 660 (8th Cir. 1981).

[6] *See* Petition For Rehearing And Suggestion For A Rehearing In Banc (Oct. 9, 1997) at 11, *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365 (2d Cir. 1997) (No. 96-7875); Brief of Defendant-Appellant (Oct. 14, 1996) at 29-32, *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 950 F. Supp. 481 (E.D.N.Y. 1996) (No. 89-0811).

foreign antisuit injunction, in part, because "plaintiff's French action includes . . . L'Agence." (Pet. App. at 29a.) CA did not inform the district court or the court of appeals that L'Agence did not join CA in its appeal, although Altai raised this concern in oral argument and with the court of appeals in a post-hearing brief. CA's brief in opposition to this Court finally admitted that L'Agence is no longer a party in France, thereby providing additional evidence of the "vexatious" nature of CA's French action. In any event, FASTER has not been a defendant since September 25, 1990. Therefore, the only two remaining parties in CA's French action are CA and Altai – the same and only parties in CA's United States case. (Pet. at 9.)

2. The Final Judgment In *Altai I* Is "Dispositive" Of CA's Action In France.

The record confirms that CA's action in France is based on conduct that is inextricably intertwined with the conduct at issue in CA's United States case. Since the two actions arise from the same nucleus of fact, the judgment in *Altai I* is dispositive of CA's action in France. At the time CA's complaint was filed in August 1988, Altai sold three products that utilized the infringing OSCAR 3.4 code. *Altai I*, 775 F. Supp. at 554-55. Altai sold these products in France shortly after January 1, 1988. (*See, e.g.*, Joint Appendix at 67-68, 907, 917, 947-51, 963-67, 992-1008, *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365 (2d Cir. 1997) (No. 96-7875)) Therefore, CA's claims of infringement under French copyright law arose prior to August 1988. The pleading that CA filed in the French Commercial Court on February 15, 1990, establishes that "the basis" of CA's French copyright action was only the events alleged in CA's United States complaint, all of which occurred before August 1988 and the additional fact that FASTER sold Altai's products in France, as evidenced by their seizure at FASTER's offices on January 23, 1990. *See* App. 252a, attached hereto as a

supplement to the Appendix To The Petition For Writ of Certiorari.[7]

These facts comprised "the basis" of CA's French copyright action. The French copyright claims asserted in that action arose and were known by CA *before* the United States district court commenced trial on March 28, 1990 and *before* a final judgment was entered on August 9, 1991, as they were part of the *same transaction* adjudicated and subject to the final judgment in *Altai I*. *See, e.g., Nevada v. United States*, 463 U.S. 110, 130 n. 12 (1983); *Davidson v. Capuano*, 792 F.2d 275, 278 (2d Cir. 1996); Restatement (Second) of Judgments § 24 (1982). Therefore, CA's French copyright claims *could* have been adjudicated by the district court, since no formal barriers prevented CA from presenting its "entire claim including any theories of recovery or demands for relief that might have been available . . . under applicable law." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (quoting Restatement (Second) of Judgments § 26(1)(c) cmt. c (1982)).[8]

3. CA's Claims Under French Copyright Law Were Merged Into The Final Judgment in *Altai I*.

CA contends that the "core of Altai's [claim preclusion] argument" rests on "Altai's wishful references" to "an alleged final judgment of 'worldwide' copyright claims." (Br. in Op.

---

[7] Altai, replaced all products that contained infringing OSCAR 3.4 with OSCAR 3.5 by July 31, 1989. *See Altai I*, 775 F. Supp. at 554. (Pet. App. at 111a) Therefore, the Altai programs CA siezed contained only OSCAR 3.5, which the district court and French Commercial Court respectively concluded did not infringe CA's copyright, either under United States or French Law.

[8] Altai did not seek the Court's review of the court of appeals' collateral-estoppel ruling because Altai believes that the Court does not need to reach that issue for Altai to prevail. Altai is not opposed to briefing this additional ground for reversal when the Court grants this petition because CA's United States action is dispositive of issues raised in its French action. *See* 4 Melville B. Nimmer & David B. Nimmer, *Nimmer On Copyright* § 17.13 at 17-91 (1997 ed.) (France applies "essentially the same test of substantial similarity [to determine copyright infringement] as is followed by American courts.")

at 6.) The record, however, belies CA's rhetoric. CA elected to bring its claims of infringement in the district court where the entire thrust of its pleading, proof, and argument was to assert that it was entitled under United States copyright law to worldwide damages for *all* acts of infringement, without regard to where they occurred. *See* Fed. R. Civ. P. 15(b). (Pet. at 6-7.)

There is no question from this record that CA knowingly assumed the risk that the district court could enter a final judgment prior to the French court issuing a decision. (Pet. App. at 148-49a.) Once that occurred, CA's claims under French law were merged into the final judgment and, as a matter of United States law, the scope of that final judgment included all claims that were submitted to and adjudicated by the district court, as well as those that *could* have been.

C. The Berne-Implementation Act Does Not Affect The Authority Of A United States Federal Court To Enter A Foreign Antisuit Injunction.

Throughout its brief, CA also misconstrues the nature and scope of the rights conferred by the Berne-Implementation Act, and the terms and conditions under which the United States became a party to the Berne Convention.[9] The key point is that the Berne-Implementation Act left intact the traditional rules of claim and issue preclusion, as well as rules of subject-matter jurisdiction, and it is on those rules that Altai relies. For this reason, Altai does not argue, as CA asserts, that the Berne Convention makes "United States and French copyright law identical or give[s] a United States owner of a French copyright

---

[9] CA incorrectly states that "national treatment" does not afford a United States owner of a French copyright "the same rights under [a] French copyright as would a copyright holder who was French national." (Br. in Op. at 11.) Rather, the Berne-Implementation Act did not provide the owner of a United States copyright with new procedural rights to pursue claims of infringement in a foreign forum to exhaustion of that country's judicial process, without regard for the principles of finality and repose established in United States law. 17 U.S.C. § 104(c) (1994). (Pet. at 25-26.)

the same rights it would have as to a United States copyright under United States law." (Br. in Op. at 11.)

Nor does Altai suggest that a French court is not a "proper forum" for the adjudication of infringement claims under French copyright law. *Id.* Altai has argued only that where a United States plaintiff, like CA, elects to submit copyright-infringement claims to the jurisdiction of a United States federal court for adjudication and where it seeks worldwide damages, as CA did, that plaintiff also submits to the controlling principle of United States law that all claims that were or *could* have been adjudicated are merged into the final judgment.

The deference of the Court of Appeals for the Second Circuit to international comity and its misperception of CA's "rights" under French copyright law (Pet. App. at 16a), amply demonstrates that the scope of the Berne-Implementation Act is an issue ripe for this Court's review and clarification.

D. The Court's Review Of The Question Presented Will Provide A Uniform And Much-Needed Standard For Obtaining A Foreign Antisuit Injunction.

CA argues that the petition asks the Court to embrace a policy requiring "U.S. courts . . . [to] decide all copyright claims — worldwide." (Br. in Op. At 11.) Of course it does not. What the petition does ask is that the Court establish a uniform standard for granting foreign antisuit injunctions involving multinational litigation once all claims are asserted before a United States court. This standard will be applicable to all cases requesting a foreign antisuit injunction, whether the claims arise under copyright, contract, or another branch of substantive law.[10]

---

[10] CA also argues that *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993), and *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 77 (1996), are "irrelevant where the two actions involve independent intellectual property rights granted under the laws of the respective fora." (Br. in Op. at 9.) Although CA describes its United States case and French action as being "utterly

Altai has not suggested that the Court require United States federal courts to decide all cases that entail worldwide claims, whether they sound in "intellectual property" or other substantive law. Instead, Altai has argued only that once a federal court permits a United States plaintiff to litigate claims of copyright infringement in a United States federal court seeking worldwide damages under United States law — as CA was permitted to do in this case — *and* where a final judgment is entered necessarily putting to rest all claims of infringement that were or could have been adjudicated, a prevailing United States defendant has the right, under well-established principles of finality and repose in United States law, to receive the full preclusive benefit of that judgment. The traditional principles of *forum non conveniens* provide the United States federal courts with the ability to decline to exercise jurisdiction to resolve foreign disputes whether that doctrine is invoked by the defendant or by the court *sua sponte*.

E. The Court Should Grant The Writ Of Certiorari.

For the reasons discussed in the petition and further elaborated herein, Altai was entitled to the injunction requested against CA either under the "laxer" circuits' standard for obtaining a foreign antisuit injunction or under

---

different," (Br. in Op. at 10.), they concern the same issue — whether Altai infringed CA's copyright in OSCAR 3.5. The fact that one action was brought under the laws of the United States and the other was brought under the laws of France goes to the heart of the question presented: the role of international comity when a United States federal court is confronted with a motion for a foreign antisuit injunction and the foreign court does not recognize the preclusive effect of a United States final judgment? We are aware of no case where this Court has carved out separate or special claim-preclusion rules applicable in contract cases, which are not equally applicable to copyright cases or those arising under any other substantive civil law. Nor should the Court be persuaded to adopt such a distinction in this case, where CA long ago conceded that its French copyright claims were "*virtually identical* to those claims that formed the basis of CA's *initial* [United States] complaint in this action." CA Memorandum For Modification Of Protective Order (Mar. 9, 1990) at 4, *Altai I* (emphasis added).

the then-prevailing standard in the Court of Appeals for the Second Circuit, which nominally permitted a foreign antisuit injunction to issue upon entry of a final judgment in one forum "which can be pled as res judicata in the other." *China Trade*, 837 F.2d at 36. The court of appeals, however, grafted two additional elements onto its post-judgment standard: (1) the foreign action must threaten the jurisdiction of the enjoining forum before a foreign antisuit injunction should be issued, (Pet. App. at 16a); and (2) international comity, which ultimately trumped all other factors in the court of appeals' analysis. (Pet. App. at 15-16a.)

This development is significant given the historical preeminence of the Court of Appeals for the Second Circuit in matters concerning copyright. Of broader concern is the wide disparity between the Courts of Appeals for the First, Second, Sixth, District of Columbia, and perhaps the Eleventh Circuits, all of which afford international comity considerations far greater deference than other United States Courts of Appeals. (Pet. at 16-21.)

This is an appropriate case for the Court to resolve the division among the circuits regarding the appropriate standard for issuing a foreign antisuit injunction, including much-needed guidance as to the weight that the lower courts should accord providing international comity in that consideration. It also provides the Court with a timely opportunity to clarify the manner in which the Berne-Implementation Act affects the rights of owners of United States copyrights when they decide to litigate copyright-infringement claims in multiple fora, including the federal courts of the United States.

The question presented by Altai's petition is unsettled, important, and will recur, particularly as the Internet and other forms of electronic communication expand the boundaries of commerce beyond the United States. CA does not dispute that this is so. Therefore, the Court should grant this writ of certiorari.

Respectfully submitted,

Of Counsel:

CHARLES ALAN WRIGHT
727 East Dean Keeton Street
Austin, Texas 78705
(512) 471-7188

MARC M. ARKIN
140 West 62nd Street
New York, New York 10023
(212) 636-6850

DAVID G. POST
1719 North Broad Street
Philadelphia, Pennsylvania 19122
(215) 204-4539

SUSAN G. BRADEN
Counsel of Record
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7075
Counsel for Petitioner

LARRY S. FREEDMAN
Platinum *technology, inc.*
1815 South Meyers Road
Oakbrook Terrace, Illinois 60181
(630) 691-0404

Dated: April 13, 1998
Washington, D.C.

/stamp:/
Chantal Morel-Pernin - Philippe Letellier
Associated Bailiffs
1, rue Jean Goujon
93290 Tremblay-les-Gonesse
Tel.: 48-60-22-13

SUMMONS TO APPEAR
BEFORE THE COMMERCIAL COURT OF BOBIGNY

COPY

On the FIFTEENTH DAY OF FEBRUARY, nineteen ninety, ~~AT THE FUBLIC PROSECUTOR'S OFFICE~~

In response to the petition of

1. Computer Associates International Inc., a company organized under American law, located at 711 Stewart Avenue, Garden City, NEW YORK 11530-4787

   instituting legal proceedings through its attorneys, domiciled at the same address

2. The Agence pour la Protection des Programmes [Program Protection Agency], an association governed by the law of 1901, with registered offices at 119, rue de Flandre, 75019 PARIS

   instituting legal proceedings through its attorneys, domiciled at the same address

   represented by. . . . . Guy Barbou, Esq.
   Court Attorney
   22 Avenue de la Grande Armée
   75017 Paris - (P 112)
   Tel.: 47-66-35-85

   who shall represent them in this case and its aftermaths, and in care of whom they elect domicile,

litigated by..... Pierre Lenoir, Esq.
Court Attorney
89 avenue Kléber
75116 Paris - (E 957)
Tel.: 45-05-80-08

I,

/stamp:/ We, the undersigned SPC Chantal Morel-PerninPhilippe Letellier, Associated Bailiffs at the Court of First Instance of Bobigny, residing at 1, rue Jean Goujon, 93290 Tremblay-les-Gonesse

have hereby provided notification, accompanied by a copy of the latter, to:

1. The Faster SARL company, a firm with capital stock amounting to 50,000.00 francs, registered in the Company Register of Bobigny under number B 333 488 716, with registered offices at the Industrial Zone of Paris, Nord 2, micropark 33, rue des Chardonnerets, 93290 Tremblay les Gonesse

   received by the attorneys domiciled at that address, or
   /stamp:/ SEE ANNEX

2. The Altai Software company, an American firm with registered offices at 624 Six Flags Drive, Suite 150, Arlington, Texas 76011

   received by the attorneys domiciled at that address, upon delivery of the copy to the Public Prosecutor's office in the Court of First Instance at the Law Courts of Bobigny, or

   /stamp:/ UNDER SEPARATE COVER

1. Of a ruling by the Public Prosecutor of the Court of First Instance of Bobigny on January 23, 1990, on a petition received by him on the same date, those documents appearing together,

2. Of a report on the seizure of counterfeits prepared by the Police Commissioner on February 2, 1990.

And, in response to the same petition, following the election of domicile and appointment of attorney as mentioned above

I,

/stamp:/ We, the undersigned SPC Chantal Morel-Pernin Philippe Letellier, Associated Bailiffs at the Court of First Instance of Bobigny, residing at 1, rue Jean Goujon, 93290 Tremblay-les-Gonesse

the aforementioned and undersigned bailiff,

have summoned the aforementioned and domiciled parties, as indicated, to appear on March 13, 1990 at 2:00 PM before the Commercial Court of Bobigny, 169, avenue Paul Vaillant Couturier, 93008 Bobigny.

The addressees are reminded, in accordance with articles 56 and 853 of the New Code of Civil Procedure, that the parties may opt to defend themselves or to be assisted or represented by any person of their choosing, and that their representative, if not an attorney, must provide proof of special credentials.

That if they fail to appear or to provide for the appearance of a representative, a verdict may be handed down based solely upon the evidence presented by the opposing party.

SUBJECT OF THE PETITION

Computer Associates International Inc. holds the copyright on computer center management software known as CA-Scheduler.

Pursuant to American law, that software was registered at the Copyright Office of Washington under numbers 2,362,601 and 2,362, 602.

This software constitutes an original work and is protected under American copyright law.

By virtue of the Universal Copyright Convention of Geneva, ratified by the United States on September 16, 1955, and the Berne Convention for the Protection of Literary and Artistic Works, ratified by the United States on March 1, 1989, this work is granted the protection accorded by the French laws of March 11, 1957 and July 3, 1985.

The CA-Scheduler software includes in particular a program called Adapter, which allows interfacing between the CA-Scheduler and operating systems used on large IBM computers, viz. MVS and VSE.

The CA-Scheduler software is registered with the Agence pour la Protection des Programmes under number 90.04.014.00.

The purpose of the Agence pour la Protection des Programmes, an association created on December 21, 1982 pursuant to the law of 1901, is:

1. To defend individuals and legal entities that have created computer programs, video games, or software packages.
2. To promote legal action or arbitration to indemnify creators for damages caused by counterfeiting.
3. To register programs in order to prove priority in the event of disputes.
4. To take actions in general in order to better defend the rights of program creators in France and internationally.

5. To go to court to defend the interests of its principals by virtue of article 65 of the law of March 11, 1957.

It has come to the attention of the plaintiffs that Faster is marketing software called "Zeke," "Zack" and "Zebb" without authorization; this software includes an essential sub-program called "Oscar," which reproduces the essential sub-program of the CA-Scheduler software, called "Adapter."

Under these circumstances, the plaintiffs were authorized by the President of the Court of First Instance of Bobigny on January 23, 1990 to proceed with the seizure of counterfeit software on Faster's premises at Tremblay les Gonesse.

The counterfeits were seized on February 2, 1990 by the Police Commissioner.

The report prepared following the seizure of counterfeits shows that Faster distributes three different types of software: Zeke - the Controller, Zack - the Operator, and Zebb - the Rerun Manager, contalning a module called Oscar.

This seizure of counterfeits resulted in the actual seizure of five magnetic tapes on which the aforementioned software was recorded.

During those operations, Mr. Duponchel, Faster's Sales Manager, stated that:

"Faster is only the distributor of the three software packages containing the disputed module, and the masters of that software were provided directly by the American company Altai Software, whose headquarters are located at 624 Six Flags Drive, Suite 150, Arlington, Texas 76011."

The report on the seizure of counterfeits, dated February 2, 1990, thus provides obvious proof that, according to the terms of article 40 of the law of March 11, 1957, and article 47 of the law of July 3, 1985, Faster and Altai

have violated the copyright of the CA-Scheduler software.

It should be specified that Computer Associates International Inc. has initiated counterfeit proceedings in the United States against Altai in connection with the latter's marketing of the Zeke, Zack and Zebb software.

During those proceedings, it was shown that Mr. Williams, President of Altai's Software Division, is a former employee of Computer Associates International Inc., for which he was responsible for developing software, and whose duties provided him access to the structure and source code of the Adapter program of the CA-Scheduler software.

Likewise, Mr. Claude Arney, a former employee of Computer Associates International Inc., responsible for the development of the Adapter program, is currently employed by Altai.

It was thus with full knowledge that Faster and Altai marketed the software in France, in violation of the copyright of Computer Associates International Inc.

Those acts of counterfeiting committed by Faster and Altai caused serious damage to Computer Associates International Inc., which is fully justified in calling for the cessation of that use, and for compensation.

The report on the seizure of counterfeits, dated February 2, 1990, shows that Faster marketed "140 Oscar modules with Zeke software, 75 with Zack, and 2 with Zebb," enabling it to realize an average sales figure of 37,555,000 francs.

Those sales represented sales lost to Computer Associates International Inc., with an ensuing and definite loss of profits.

Computer Associates International Inc. is therefore entitled to claim compensation.

The Court shall therefore appoint an expert to assess the damages suffered by the plaintiff and shall award the latter a provisional indemnity of 5,000,000 francs at this time.

The Agence pour la Protection des Programmes is equally entitled to claim compensation for damages.

Indeed, Faster and Altai infringed the copyright of software registered with that Agency.

The Agence pour la Protection des Programmes therefore suffered direct and personal damage, both material and moral, as the counterfeiting committed by the defendants interfered with its purpose and constituted an obstacle to its proper functioning.

Pursuant to the provisions of article 65 of the law of March 11, 1957, the Agency is competent to go to court to defend interests that fall within its statutory responsibility.

To that end, it is entitled, as specified in its bylaws, to defend the collective interests of individuals or legal entities that have created computer programs and have registered that software with the Agency.

The Agency is thus fully entitled to claim compensation for damages suffered in excess of 50,000 francs.

It would be unfair for the plaintiffs to be held liable for costs incurred by them to defend their rights.

Consequently, grounds exist for the implementation of article 700 of the New Code of Civil Procedure.

ON THESE GROUNDS

To entitle Computer Associates International inC.A.nd the Agence pour la Protection des Programmes to proceed with their claims and to deem them fully justified:

To declare and deem proper and valid the seizure of counterfeits from Faster's premises on February 2, 1990. To confirm the latter.

To declare and to rule that Faster and Altai have counterfeited programs the right for which are owned by Computer Associates International inc. under the terms of the laws of March 11, 1957 and July 3, 1985, in particular the Adapter sub-program.

To order the immediate cessation of any act constituting the reproduction and/or marketing and for use of the programs in question, and the definitive fine of 200,000 francs per infraction.

To appoint an expert of the Court's choosing, whose mission is to hear the parties and all knowledgeable persons, to obtain and examine all useful documents, on Faster's premises, if applicable, to which he shall be granted access, to assess the body of counterfeit materials and collect all evidence enabling the Court to assess the damage suffered by Computer Associates International Inc., as a result of the violation of its copyright.

To declare that in the event of the expert's refusal, or the existence of an impediment, another expert shall be duly appointed by an order issued by simple request.

To hereby sentence Faster and Altai jointly to pay Computer Associates International Inc. the provisional amount of 5,000,000 francs for damages.

To sentence Faster and Altai jointly to pay the Agence pour la Protection des Programmes the amount of 50,000.00 francs for the compensation of damages.

To order the compensation and return to Computer Associates International Inc. of all media, regardless of their form, on which the counterfeit programs and all corresponding documentation are recorded.

To order the publication of the verdict in three newspapers or magazines of the plaintiffs' choosing, at the defendants' expense, in addition to the compensation of damages.

To order the provisional implementation of the ruling to be handed down, in view of the urgency of the matter.

To sentence Faster and Altai jointly to pay each of the plaintiffs the amount of 30,000.00 francs pursuant to article 700 of the New Code of Civil Procedure.

To sentence Faster and Altai to bear all costs.

WITH ALL PROPER RESERVES

Chantal MOREL PERNIN – Philippe LETELLIER,
Huissiers de Justice Associés
1, rue Jean Goujon
93290 TREMBLAY-LES-GONESSE
Tel. 48 60 22 13

ASSIGNATION
DEVANT LE TRIBUNAL DE COMMERCE DE BOBIGNY

L'An Mil neuf cent quatre vingt dix et le QUINZE FEVRIER
~~et ce AU PARQUET DE MONSIEUR LE PROCUREUR DE LA REPUBLIQUE~~

A la demande de

1. La Société COMPUTER ASSOCIATES INTERNATIONAL INC. Société de droit americain 711 Stewart avenue, Garden City NEW YORK 11530-4787

   agissant poursuites et diligences de ses représentants légaux y domiciliés

2. L'Agence pour la Protection des Programmes, association loi de 1901 dont le siège social est 119, rue de Flandre 75019 PARIS

   agissant poursuites et diligences de ses représentants légaux y domiciliés

comparaissant par. . . . . Maître Guy BARBOU
Avocat à la Cour
22 Avenue de la Grande Armée
7517 PARIS - (P112)
Tel : 47.66.35.85

chez lequel elles font élection de domicile et qui occupera sur la présente et ses suites,

plaidant par. . . . . Maître Pierre LENOIR
Avocat à la Cour
89, avenue Kléber
75116 PARIS (E 957)
Tel : 45.05.80.08

J'ai

Nous SCP Chantal MOREL-PERNIN Philippe LETELLIER, Huissiers de Justice Associés près le Tribunal de Grande Instance de Bobigny, résidant à TREMBLAY LES GONESSE, 1, rue Jean-Goujon, soussignés.

dénoncé en tête des présentes et laissé copie à:

1. La Société FASTER SARL au capital de 50.000,00 Francs immatriculée au RCS de BOBIGNY sous le n B 333 488 716 ayant son siège social Zone Industrielle PARIS nord 2 micropark 33, rue des Chardonnerets 93290 TREMBLAY LES GONESSE

   prise en la personne de ses représentants légaux y domiciliés, ou étant et parlant à (VOIR ANNEXE)

2. La Société ALTAI SOFTWARE Société de droit américain dont le siège social est 624, Six Flags Drive, suite 150 Arlington TEXAS 76011

   prise en la personne de ses représentants légaux y domiciliés, par remise de la copie à Monsieur Le Procureur de la République près le Tribunal de Grande Instance en son Parquet Diplomatique, au Palais de Justice de BOBIGNY, ou étant et parlant à

(PAR COPIE SÉPARÉE)

1. D'une ordonnance rendue par Monsieur Le Président du Tribunal de Grande Instance de BOBIGNY le 23 janvier 1990 mise au bas d'une requête à lui présentée le même jour, ensemble lesdites requête et ordonnance,

2. D'un procès verbal de saisie-contrefaçon dressé par Commissaire de Police le 2 février 1990.

Et à même requête, élection de domicile et constitution d'avocat que dessus,

j'ai, Nous SCP Chantal MOREL-PERNIN Philippe LETELLIER, Huissiers de Justice

Associés Tribunal de Grande Instance de Bobigny résidant à TREMBLAY LES GONESSE, 1, rue Jean-Goujon soussignés huissier susdit et soussigné,

donné assignation aux susnommées et domiciliées, ou étant et parlant comme indiqué à comparaître le 13 Mars 1990 à 14 heures devant le Tribunal de Commerce de BOBIGNY 169, avenue Paul Vaillant Couturier 93008 BOBIGNY.

Il est rappelé aux destinataires conformément aux articles 56 et 853 du Nouveau Code de Procédure Civile que les parties se défendent elles-mêmes ou qu'elles ont la faculté de se faire assister ou représenter par toutes personnes de leur choix; que leur représentant s'il n'est avocat doit justifier d'un pouvoir spécial.

Que faute de comparaître ou de se faire représenter, elles s'exposent à ce qu'un jugement soit rendu contre elles sur les seuls eléments fournis par leurs adversaires.

OBJET DE LA DEMANDE

La Société COMPUTER ASSOCIATES INTERNATIONAL INC. est titulaire des droits d'auteur sur un logiciel de gestion de centres informatiques intitulé CA-SCHEDULER.

En application de la loi américaine, ce logiciel a été déposé au "Copyright Office" de WASHINGTON et enregistré sous les numéros 2.362.601 et 2.362.602.

Ce logiciel constitue une oeuvre originale qui bénéficie de la protection de la loi américaine sur le droit d'auteur.

En vertu de la Convention Universelle sur le Droit d'Auteur de GENEVE ratifiée par les ETATS UNIS le 16 septembre 1955 et de la convention de BERNE pour la protection des Oeuvres Littéraires et Artistiques ratifiée par les ETATS UNIS le ler mars 1989, cette oeuvre bénéficie de la protection accordée par les lois françaises du 11 mars 1957 et du 3 juillet 1985.

Le logiciel CA-SCHEDULER comprend particulièrement un programme intitulé ADAPTER qui permet l'interface

entre le CA-SCHEDULER et les systèmes d'exploitation utilisés sur les gros ordinateurs IBM a savoir le MVS et le VSE.

Le logiciel CA-SCHEDULER est enregistré à l'Agence pour la Protection des Programmes sous le n' 90.04.014.00.

L'Agence pour la Protection des Programmes qui est une association loi de 1901 créée le 21 décembre 1982 a pour objet de:

1. Défendre les personnes physiques ou morales créatrices de programmes informatiques, de jeux vidéo, ou de progiciels.
2. Promouvoir les actions amiables ou judiciaires tendant à la réparation des préjudices subis par les créateurs du fait des contrefaçons.
3. Prendre en dépôt les programmes de manière à apporter des éléments de preuve d'antériorité en cas de contestation.
4. Mener des actions d'ordre général pour l'amélioration en FRANCE et au niveau international de la défense des droits des créateurs de programmes.
5. Ester en justice pour défendre les intérêts de ses mandants en vertu de l'article 65 de la loi du 11 mars 1957.

Les demanderesses ont appris que la Société FASTER commercialise sans autorisation des logiciels intitulés "ZEKE", "ZACK" et "ZEBB" qui comprennent un sous programme essentiel identifié "OSCAR" qui reproduit le sous programme essentiel du logiciel CA-SCHEDULER intitulé "ADAPTER".

Dans ces conditions, les demanderesses se sont fait autoriser par ordonnance rendue par Le Président du Tribunal de Grande Instance de BOBIGNY le 23 janvier 1990 à procéder à la saisie-contrefaçon des logiciels contrefaisants se trouvant dans les locaux de la Société FASTER à TREMBLAY LES GONESSE.

La saisie-contrefaçon a été effectuée le 2 février 1990 par Comissaire de Police.

Il résulte du procès verbal dressé à la suite des opérations de saisie-contrefaçon que la Société FASTER distribue trois logiciels différents: ZEKE - THE CONTROLLER, ZACK - THE OPERATOR, ZEBB-THE RERUN MANAGER dans lesquels figure un module baptisé OSCAR.

Cette saisie-contrefaçon a donné lieu à la saisie réelle de cinq bandes magnétiques sur lesquelles sont enregistrés les trois logiciels précités.

Au cours de ces opérations, Monsieur DUPONCHEL, Directeur des ventes de la Société FASTER a déclaré que:

"la Société FASTER n'est que distributrice des trois logiciels contenant le module incriminé, dont les masters lui sont fournis directement par la Société américaine ALTAI SOFTWARE dont le siège est situé 624 Six Flags Drive suite 150 ARLINGTON TEXAS 76011".

Le procès verbal de saisie-contrefaçon du 2 février 1990 apporte donc la preuve manifeste que la Société FASTER et la Société ALTAI ont commis selon les termes de l'article 40 de la loi du 11 mars 1957 et 47 de la loi du 3 Juillet 1985 des actes de contrefaçon du logiciel CA-SCHEDULER.

Il convient de préciser que la Société COMPUTER ASSOCIATES INTERNATIONAL INC.A. diligenté aux ETATS-UNIS une procédure en contrefaçon contre la Société ALTAI à raison de la commercialisation par cette dernière des logiciels ZEKE, ZACK et ZEBB.

Au cours de cette procédure, il est apparu que Monsieur WILLIAMS, Président de la Division "SOFTWARES" de la Société ALTAI est un ancien employé de la Société COMPUTER ASSOCIATES INTERNATIONAL INC.A.u sein de laquelle il était chargé de développer des logiciels et que ses fonctions lui ont permis d'avoir

accès à la structure et au code source du programme ADAPTER du logiciel CA-SCHEDULER.

De même, Monsieur Claude ARNEY, ancien employé de la Société COMPUTER ASSOCIATES INTERNATIONAL INC. chargé du développement du programme ADAPTER, est aujourd'hui employé par la Société ALTAI.

C'est donc en parfaite connaisssance de cause que les Sociétés FASTER et ALTAI ont commercialisé en France des logiciels contrefaisant les droits d'auteur de la Société COMPUTER ASSOCIATES INTERNATIONAL INC.

Ces actes de contrefaçon commis par les Sociétés FASTER et ALTAI ont causé un grave préjudice à la Société COMPUTER ASSOCIATES INTERNATIONAL INC., dont elle est bien fondée à réclamer la cessation et la réparation.

Il résulte du procès verbal de saisie-contrefaçon du 2 février 1990 que la Société FASTER a commercialisé "140 modules OSCAR sur logiciel ZEKE, 75 sur ZACK et 2 sur ZEBB" ce qui lui a permis de réaliser un chiffre d'affaires moyen de 37.555.000 Francs.

Ces ventes constituent des ventes manquées par la Société COMPUTER ASSOCIATES INTERNATIONAL INC. et la prive ainsi d'un manque à gagner certain.

Elle est donc en droit de réclamer réparation.

Le Tribunal devra donc nommer un expert afin qu'il évalue le préjudice subi par la demanderesse et devra d'ores et déjà allouer à cette dernière une indemnité provisionnelle de 5.000.000 Francs.

L'Agence pour la Protection des Programmes est également en droit de demander réparation de son préjudice.

En effet les Sociétés FASTER et ALTAI ont commis des actes de contrefaçon d'un logiciel qui a fait l'objet d'un enregistrement auprès de cette dernière.

L'Agence pour la Protection des Programmes a donc eu á souffrir d'un préjudice direct et personnel, tant matériel que moral, les contrefaçons dont les défenderesses se sont rendues coupables ayant porté atteinte à son objet et entravé son action propre.

Il résulte des dispositions de l'article 65 de la loi du 11 mars 1957 que l'Agence a qualité pour ester en justice pour assurer la défense des intérêts dont elle a statutairement la charge.

A ce titre, elle est en droit comme le précisent ses statuts de défendre les intérêts collectifs des personnes physiques ou morales créatrices de programmes informatiques, en particulier lorsqu'il s'agit de personnes physiques ou morales ayant enregistré à l'Agence les logiciels dont ils sont les auteurs.

L'Agence est ainsi bien fondée à demander réparation du préjudice subi que l'on ne saurait estimer à moins de 50.000 Francs.

Il serait inéquitable de laisser à la charge des demanderesses les frais qu'elles ont été contraintes d'engager pour défendre leurs droits.

Il y a donc lieu à application de l'article 700 du NCPC.

PAR CES MOTIFS

Recevoir la Société COMPUTER ASSOCIATES INTERNATIONAL INC. et l'Agence pour la Protection des Programmes en leurs demandes et les dire bien fondées :

Dire et juger bonne et valable la saisie contrefaçon effectuée le 2 Février 1990 dans les locaux de la Société FASTER. La valider.

Dire et juger que les Sociétés FASTER et ALTAI ont commis des actes constitutifs de contrefaçon des programmes dont la Société COMPUTER ASSOCIATES INTERNATIONAL INC. est titulaire dans les termes des

lois du 11 mars 1957 et du 3 juillet 1985, et particulièrement du sous programme ADAPTER.

Ordonner la cessation immédiate de tout acte constitutif de reproduction et/ou de commercialisation et/ou d'utilisation des programmes en cause sous astreinte définitive de 200.000 Francs par infraction constatée.

Nommer tel expert qu'il plaira au Tribunal désigner avec la mission d' entendre les parties et tous sachants, de se faire remettre et compulser tous documents utiles éventuellement dans les locaux de la Société FASTER auxquels il aura accès, de déterminer la masse contrefaisante et de recueillir tous éléments permettant au Tribunal d'apprécier le préjudice subi par la Société COMPUTER ASSOCIATES INTERNATIONAL INC. du fait de la violation de ses droits d'auteur.

Dire qu'en cas de refus ou d'empêchement, il sera procédé à la désignation d'un autre expert par ordonnance rendue sur simple requête.

Condamner dès à présent in solidum les Sociétés FASTER et ALTAI à verser à la Société COMPUTER ASSOCIATES INTERNATIONAL INC. la somme de 5.000.000 Francs à titre de dommages et intérêts provisionnels.

Condamner in solidum les Sociétés FASTER et ALTAI à verser a l'Agence pour la Protection des Programmes la somme de 50.000,00 Francs en réparation de son préjudice.

Ordonner la confiscation et la remise à la Société COMPUTER ASSOCIATES INTERNATIONAL Inc. de tous supports, quelque soit leur forme, sur lesquels sont enregistrés les programmes contrefaisant ainsi que toute documentation s'y rapportant.

Ordonner la publication du jugement à intervenir dans trois journaux ou revues au choix des demanderesses et aux frais des défenderesses au besoin à titre de complément de dommages et intérêts.

Ordonner vu l'urgence l'exécution provisoire de la décision à intervenir.

Condamner in solidum les Sociétés FASTER et ALTAI à verser à chacune des demanderesses la somme de 30.000,00 Francs au titre de l'article 700 du NCPC.

Condamner les Sociétés FASTER et ALTAI aux entiers dépens.

SOUS TOUTES RESERVES